ANWAR ABDUL RAHIM

v.

BAYER (M) SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-281-1995]
22 NOVEMBER 1997

LABOUR LAW: *Employment - Constructive dismissal - Test for - Whether to consider if employer's conduct was unfair or unreasonable - Whether must be proven that employer's conduct was in fact unfair or unreasonable - Whether a fundamental breach which goes to root of employment contract - Whether Industrial Court applied correct test*

LABOUR LAW: *Industrial Court - Procedure - Pleadings - Whether issues not pleaded can be raised later during trial - Whether Industrial Court had erred in adjudicating on points not pleaded - Whether irrelevant point considered*

One of the respondent's departments, headed by one Chee, was upgraded as a business group. This involved more staff manning its functions. As a result, the respondent sent a proposal in the form of a memo to the appellant and Chee requesting them to interchange their rooms to cope with the space constraint.

The appellant contended that this matter, amongst other past incidents, was meant to force him out of employment and, accordingly, considered himself to have been dismissed.

The Industrial Court held that the appellant was constructively dismissed by the respondent (see [1994] 1 ILR 473). The High Court however quashed the award on the ground that the Industrial Court had erred in coming to such a finding.

The appellant appealed to the instant court.

Held:
Per Mahadev Shankar JCA

[1] The proper approach in deciding whether constructive dismissal has taken place is **not** to ask oneself whether the employer's conduct is unfair or unreasonable (ie, the unreasonable test). It must be proven that the conduct of the employer is such, that it amounts to a fundamental breach which goes to the root of the contract, or that it illustrates the employer's intention of not wanting to pursue the contractual relationship anymore.

[2] There was no finding that the alleged breach was a fundamental breach that went to the root of the contract. The memo was merely a proposal and not an order. At most, it was only the appellant's impression that the company wanted him out.

[3] Parties should be confined, during the trial, to the issues raised in their pleadings. This rule, which is based on justice and equity, applies equally to the Industrial Court. It will be unfair and unjust to permit a party to raise other points of complaint at the trial for which no formal notice has been given.

[4] The doctrine of waiver or condonation applies equally to employees. Therefore, if cumulative misconduct is being urged, it must be pleaded and evidence has to be given to show that each misconduct was so connected with the culminating act of misconduct as to form part of the same transaction.

[5] The Industrial Court had erroneously permitted the appellant to raise all sorts of other matters which were calculated to prejudice the fairness of the trial. It should have confined itself to the issues raised.

[6] The Industrial Court had erred in asking itself the wrong questions and had applied the wrong test. It had also taken into account irrelevant considerations by going into previous acts of alleged victimisation which were not pleaded but introduced for the first time at the Industrial Court hearing.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Salah sebuah daripada bahagian pihak responden, yang diketuai oleh Chee, telah ditingkatkan tarafnya ke status kumpulan. Ini bermakna lebih kakitangan diperlukan olehnya untuk menjalankan operasinya. Berikutan hal ini pihak responden telah mengcadangkan, dalam bentuk sekeping memo yang dihantar kepada perayu dan Chee, untuk menukarkan bilik perayu dengan Chee supaya masalah kekurangan tempat dapat diatasi.

Perayu telah mengutarakan perkara ini, beserta dengan hal-hal lain, untuk membuktikan bahawa pihak responden ingin memaksanya berhenti bekerja dan oleh itu, beliau sejurusnya menganggap dengan sendirinya bahawa dia telah dibuang kerja.

Mahkamah Perusahaan telah memutuskan bahawa perayu telah dibuang kerja secara konstruktif (sila lihat [1994] 1 ILR 473). Tetapi, apabila kes ini dihadapkan ke Mahkamah Tinggi, keputusan tersebut telah dimansuhkan atas alasan bahawa pengerusi Mahkamah Perusahaan telah melakukan kesilapan dalam membuat keputusan tersebut.

Pihak perayu kemudiannya membuat rayuan ke mahkamah ini.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Di mana isu pembuangan kerja secara konstrukif diutarakan, pendekatan yang sebetulnya **tidak merangkumi** aspek menilaikan samada kelakuan majikan adalah tidak adil atau tidak munasabah. Ianya harus dibuktikan bahawa kelakuan majikan adalah sebegitu rupa di mana ia merupakan kesilapan asas yang mempunyai kesan terhadap dasar kontrak tersebut atau, ia menunjukkan bahawa pihak majikan tidak ingin lagi meneruskan perhubungan kontraktual mereka.

[2] Tidak terdapat apa-apa bukti yang menunjukkan bahawa tuduhan pihak perayu merupakan sesuatu kesilapan asas yang mempunyai kesan terhadap dasar kontrak tersebut. Memo yang dihantar hanya merupakan sebuah cadangan dan bukannya suatu perintah. Pada hakikatnya, adalah didapati tuduhan pihak perayu hanya merupakan andaiannya semata-mata.

[3] Pihak-pihak seharusnya menghadkan penghujahan mereka semasa perbicaraan kepada isu-isu yang diutarakan dalam pliding mereka. Aturan ini, yang berasaskan prinsip keadilan dan ekuiti, turut terpakai di Mahkamah Perusahaan. Adalah tidak adil untuk membenarkan pihak untuk mengutarakan fakta-fakta di mana notis secara formal tidak diberikan kepada pihak sebelah.

[4] Doktrin penyingkiran atau pengampunan turut terpakai terhadap pihak pekerja. Maka, bilamana kesalahan kumulatif diutarakan, ia seharusnya mesti diplidkan dan bukti harus diberi untuk menunjukkan bahawa setiap kesalahan berkait sebegitu rupa untuk ianya dianggap sebahagian dari suatu urusan yang sama.

[5] Mahkamah Perusahaan telah secara silap membenarkan pihak perayu untuk mengutarakan hal-hal lain yang akan mempunyai kesan prejudis terhadap melaksanakan suatu perbicaraan yang adil. Mahkamah seharusnya menumpukan perhatian terhadap isu-isu yang diketengahkan dalam pliding.

[6] Pengerusi telah melakukan kesilapan semasa melakukan penilaiannya dan telah menggunakan ujian yang salah. Beliau juga telah mengambil kira hal-hal yang tidak relevan apabila beliau telah menimbangtara hal-hal lampau yang tidak terkandung dalam pliding tersebut. Isu pemangsaan telah dihadapkan pada pertama kali di mahkamah.

[Rayuan ditolak dengan kos.]

Cases referred to:

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 ***(refd)***

Holiday Inn Kuching v. Elizabeh Lee Chai Siok [1992] 1 CLJ 141 ***(cit)***

Malayan Banking Bhd v. Association of Bank Officer [1988] 1 CLJ 27 ***(refd)***

Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(foll)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45 ***(cit)***

[Appeal from High Court, Seremban; Originating Motion No: R3-25-56-94]

For the appellant - B Lobo; M/s Lobo & Assoc
For the respondent - TM Varughese; M/s TM Varughese & Co

Reported by M Bawani

JUDGMENT

Mahadev Shankar JCA:

The appellant (Anwar) claimed that he had been constructively dismissed by the respondent (Bayer (M)). The Industrial Court upheld Anwar's claim. The High Court quashed the award of the Industrial Court. We dismissed Anwar's appeal to us. Our reasons now follow.

Anwar first joined Bayer (M) in December 1975. He resigned of his own accord in June 1980. Subsequently he rejoined Bayer (M) in January 1981 as Senior Executive. From about 2 May 1984 Anwar became Bayer (M)'s Personnel and Administration Manager. Bayer (M) then decided to put up a factory in Shah Alam (the Shah Alam project). In 1986 Anwar was allocated duties in connection with the Shah Alam project as a Liaison Officer. He was sent to Germany for special training in this connection. Upon his return he continued to be responsible for this project.

In 1989 Bayer (M)'s administrative offices were located on the 6th Floor of Pernas International at Jalan Sultan Ismail, Kuala Lumpur. T.S. Chee (Chee) was the Section Manager for the Diagnostic Division. On 1 June 1989 Mr. Herzer joined Bayer (M) as its Managing Director. Because there were serious space constraints in the Pernas International Building, Bayer (M) relocated its office to the MPSA Building in Shah Alam. Ho Toong Seng (Ho) was the Company Secretary.

In August 1989 the Diagnostic Section of Bayer (M) took over the operations of its Singapore Company (Bayer (S)). The Diagnostic Division (DS) was upgraded as a business group with Bayer (M). Chee was made Business Group Manager of this Diagnostic Business Group. His staff increased by eight persons. Additional space was required for them and for demonstration of the Diagnostic equipment.

On 17 October 1989 Mr. Herzer issued a memo countersigned by Ho addressed to both Chee and Anwar. It reads as follows Appeal Record p. 100:

> Diagnostics division has been up-graded as a business group within Bayer Malaysia. In August, DS also took over the Singapore operations.
>
> Mr. Chee's present room (originally meant for section manager) is inadequate for him to function.
>
> We propose that M/s Chee and Anwar exchange their present rooms. To avoid any disruption during normal office hours, we suggest the re-siting takes place on Saturday morning, that is 21 October 1989.
>
> Mr. Chee's two other staff will also move into the admin. area.

This memo was only a proposal. It was not an order. The 17 October was a Tuesday. Anwar asked for a discussion. This took place on 19 October (a Thursday) when Anwar asked for clarification of the memo.

On 23 October 1989 (ie, the following Monday) Anwar wrote a letter to the Manager. It read as follows Appeal Record p. 61:

Dear Sir,

I refer to your memo dated 17th October, 1989 and the discussion with you on the 19th October, 1989 when I sought clarification on the contents of your memo.

In the light of what had transpired since your arrival in the company in June 1989, the contents of your memo is a clear indication that you want to drive me out of my employment for reasons best known to you. I am now convinced of this, in view of your suggestion that the company can pay me severance pay and "help" me to seek another job through a placement agency.

Under the circumstances I have no alternative but to consider myself dismissed by you with effect from today.

Anwar handed this letter to Mr. Herzer's Secretary and walked out.

In his Statement of Case Anwar stated Appeal Record p. 59:

3.1 By a memo dated 17th October 1989, the Claimant was asked to "exchange" rooms with another colleague one Mr. T.S. Chee. At the same time the Claimant was also relieved of his admin. functions. The Claimant then sought and had a meeting with the company's Managing Director who made it clear that the company did not want to continue the employment relationship with the Claimant.

In its Statement of Reply Bayer (M) said Appeal Record p. 62:

3. Para 3.1 of the Statement of Case is a distortion of facts and is denied except that the Company did issue a memo dated 17th October, 1989 as per copy annexed hereto and marked **"Co. 1"**. The Claimant is put to strict proof as to the contents in para 3.1.

4. The Company did receive from the Claimant **"CL-1"** referred to in para 3.2 of the Statement of Case.

It is manifestly obvious from the above that Anwar confined himself to the events which occurred on 17 and 19 October 1989 to urge his claim.

As to what happened on 19 October 1989 Anwar said this in his evidence-in-chief Appeal Record p. 168:

Q. Who is Mr. Chee?

A. He is a manager in the Diagnostic Division.

Q. Where did you sit after that?

A. I was told to go to Mr. Chee's room. I did not go to his room. Then I made an appointment to see him and managed to see Mr. Herzer on 19.10.1989. I went to see him regarding the memo and expressed my reservation and asked him what his intention was. He told me that Mr. Chee needs the room. But I told him if I move out of my room it would very embarassing for me. I asked him whether he does not want me in the Company.

Mr. Herzer told me that the Company may be able to find me another job through a placement agency.

Q. What impression did you get?

A. My impression was that he wanted me out of the Company.

Q. What did you do after that?

A. I then went back to my room and contemplated what I should do.

Q. Did you then write the letter CL-1 found in the Statement of Case?

A. Yes! I did. (Claimant read the letter CL-1).

Q. Did you get a reply to your letter CL-1?

A. No!

In cross-examination he said Appeal Record pp. 179-180:

Q. What transpired between you and Mr. Herzer on 19.10.1989? Tell the court.

A. On that day, I seeked an appointment on the verification of the letter dated 17.10.1989. This was on 19.10.1989. I asked him his move would embarass me and is it intention to ask me to leave. He said no but Mr. Herzer said he could help to get another job.

Q. In cross examination you mentioned that my impression was that they really wanted to get me out. It is only your impression?

A. It is purely my impression. Mr. Herzer did not tell me he wanted to get rid of me.

For the purposes of this Appeal we propose to accept this evidence at face value.

The rule that parties should be confined to the issues raised in their pleadings applies equally in the Industrial Court. This rule is based on justice and equity because it is unfair and unjust to permit a party to raise other points of complaint at the trial of which no formal notice has been given. The Industrial

Court made a serious blunder when it permitted Anwar to raise all sorts of other matters which was only calculated to prejudice the fair trial of this case. It should have confined itself to the issues raised.

Be that as it may when it came to the crunch the material part of the Chairman's findings in his own words are as follows Appeal Records p. 157-159:

> The company has the right to reorganise or restructure its business in the way it likes for the purpose of economy or convenience provided that it acts *bona fide*. However it is my finding that the company had not acted *bona fide* in this matter.
>
> The reason for his resigning from the company was due to the conduct of the company between 1 June 1989 and 15 October 1989 the taking away of his Admin. Manager's post, taking way of his responsibilities from the Warehouse and Transport, taking away his car park to give to an expatriate, removing his secretary and his staff, not naming him as Personnel and Administrative Manager in the BG meeting and finally requesting the Claimant to exchange his room with T.S. Chee, who is lower in position to the Claimant, showed loss of confidence in the claimant by the company. The treatment accorded to the claimant was certainly not justified. The chain of evidence goes to prove that the exchanging of rooms amounted to demotion and embarassment to the claimant.
>
> The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the company which may cumulatively amount to breach of the terms. These repudiatory acts taken cumulatively or individually establish a strong and indefensible case of constructive dismissal by the company.
>
> To constitute a breach of implied term **it is not necessary to show that the employer intended any repudiation of the contract**. The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, **judged reasonably and sensibly,** is such that the employee cannot be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed. Therefore the company's argument that there was a delay from 3 July 1989 to 23 October 1989 on the part of the claimant and therefore he now cannot raise those issues does not hold water.
>
> It is the court's view that the company will not, **without reasonable and proper cause,** conduct itself in a manner likely to damage the relationship of confidence and trust between the company and the claimant. (Emphasis added).

It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether "the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract". (See *Holiday Inn Kuching v. Elizabeh Lee Chai Siok* [1992] 1 CLJ 141 and *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92 at p. 94.

In the court below YA Low Hop Bing found that the Chairman had applied the wrong test. We agree. The factual issue was whether Bayer (M)'s **proposal** that Anwar move to Chee's room was made with a view to finding a solution to problems of space or whether it was done to evince an intention no longer to be bound by the contract. If it was a breach to suggest that Anwar could move to Chee's room (and we cannot see in the circumstances how it was) we fail to see how it can be urged that this breach was so fundamental as to go to the root of the contract.

This case comes very close to what happened in *Malayan Banking Bhd. v. Association of Bank Officers* [1988] 3 MLJ 204 where YAA Abdoolcader SCJ held at p. 207:

> In the light of the several matters I have discussed and considered against the background of the law in regard to jurisdictional error, the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. The Industrial Court accordingly transcended its jurisdiction in making the award that it did and the privative provisions of a 33B(1) of the Industrial Relations Act would not accordingly preclude the issue of *certiorari* in the circumstances.

As YA Gopal Sri Ram JCA said in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748 at pp. 749-750:

> [6] An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law and it is no longer of concern whether the error is jurisdictional or not. Such distinction ought no longer to be maintained. If there is an error of law upon which the award of the tribunal is found, such error whether of interpretation or otherwise must necessarily be within jurisdiction or in excess of jurisdiction. It follows that the decision of the Board in *South East Asia Fire Bricks v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1981] AC 363, and all those cases approved by it, are no longer good law. By the same token, the cases of *Kanan v. Menteri Buruh dan Tenaga Rakyat* [1974] 1 MLJ 90 and *Lian Yit Engineering Works Sdn. Bhd. v. Loh Ah Fon & Ors* [1974] 2 MLJ 41, though disapproved or overruled by the Board, must now be taken to have always correctly stated the law.

[7] Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause, however widely drafted. The ouster clause in s. 33B(1) of the Act, therefore, does not disable the High Court from exercising its judicial review of awards of the Industrial Court.

[8] It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But an error of law would be disclosed if the decision maker asks himself the wrong questions, or takes into account irrelevant considerations, or omits to take into account relevant consideration, or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

This was applied in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p. 390.

In the present case there was no finding that the alleged breach on 17 and 19 October 1989 was a fundamental breach going to the root of the contract. At its very highest it was only Anwar's impression that Bayer (M) wanted to get him out. Indeed Anwar's evidence was that he pointedly asked Mr. Herzer if it was Mr. Herzer's intention to ask him to leave and Mr. Herzer said no. The Chairman of the Industrial Court completely failed to deal with the actual evidence of what transpired on 19th October 1989. He did not even apply his mind to what Anwar had said.

We are concerned here with the decision making process. With respect the Chairman asked himself the wrong questions and applied the wrong test.

He also took into account irrelevant considerations by going into previous acts of alleged victimisation which were not pleaded but brought out for the first time at the hearing in the Industrial Court. Contrary to Anwar's statement of claim there was no evidence whatsoever that he had been "relieved of his administrative functions" on 17 or 19 October 1989. The doctrine of waiver or condonation applies equally to employees. Therefore if cumulative misconduct is being urged it must be pleaded and evidence has to be given to show that each misconduct was so connected with the culminating act of misconduct as to form part of the same transaction. That is not what was pleaded here.

We therefore dismissed this Appeal with costs here and below and that the deposit be paid out to the respondent to account of their taxed costs.